

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 WILSON LEBRANDON WHITE,
12 Plaintiff,
13 v.
14 MIKE GIBILISCO, et al.,
15 Defendants.

16 No. 2:24-cv-2273 AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

17 Plaintiff is a county prisoner who filed this civil rights action pursuant to 42 U.S.C.
18 § 1983 without a lawyer. He has requested leave to proceed without paying the full filing fee for
19 this action, under 28 U.S.C. § 1915. Plaintiff has submitted a declaration showing that he cannot
20 afford to pay the entire filing fee. See 28 U.S.C. § 1915(a)(2). Accordingly, plaintiff's motion to
21 proceed in forma pauperis is granted.¹

22 Also pending before the court are plaintiff's third amended complaint ("TAC"),² motion

23 ¹ This means that plaintiff is allowed to pay the \$350.00 filing fee in monthly installments that
24 are taken from the inmate's trust account rather than in one lump sum. 28 U.S.C. §§ 1914(a). As
25 part of this order, the prison is required to remove an initial partial filing fee from plaintiff's trust
26 account. See 28 U.S.C. § 1915(b)(1). A separate order directed to CDCR requires monthly
27 payments of twenty percent of the prior month's income to be taken from plaintiff's trust account.
28 These payments will be taken until the \$350 filing fee is paid in full. See 28 U.S.C. § 1915(b)(2).

² Plaintiff filed the original complaint on August 21, 2024. ECF No. 1. Before the court could
screen the original complaint, plaintiff filed a first, second, and third amended complaints. ECF
(continued...)

1 for preliminary injunction, motions to appoint counsel, and motions to commence discovery.
 2 ECF Nos. 2, 6, 7, 9, 10, 12, 13, 16. For the reasons discussed below, the court finds that plaintiff
 3 has stated some cognizable claims and will be given the options to proceed on the TAC as
 4 screened in Section I.C. or to file an amended complaint. The court will deny plaintiff's motion
 5 to appoint counsel and to commence discovery and recommend that plaintiff's motion for
 6 preliminary injunction be denied.

7 I. Statutory Screening of Plaintiff's Complaint

8 A. Legal Standard

9 The court is required to screen complaints brought by prisoners seeking relief against “a
 10 governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). A
 11 claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v.
 12 Williams, 490 U.S. 319, 325 (1989). The court may dismiss a claim as frivolous if it is based on
 13 an indisputably meritless legal theory or factual contentions that are baseless. Neitzke, 490 U.S.
 14 at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an
 15 arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989).

16 In order to avoid dismissal for failure to state a claim a complaint must contain more than
 17 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause
 18 of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
 19 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
 20 statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim upon which the
 21 court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. “A claim has facial
 22 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 23 inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678. When
 24 considering whether a complaint states a claim, the court must accept the allegations as true,
 25 Erickson v. Pardus, 551 U.S. 89, 93-94 (2007), and construe the complaint in the light most

26
 27 Nos. 8 (first amended complaint), 11 (second amended complaint), 16 (TAC, although labeled
 28 second). Because the third amended complaint supersedes the prior complaints filed, the court
 will proceed to screen the TAC.

1 favorable to the plaintiff, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

2 B. Factual Allegations of the Complaint

3 The TAC alleges that defendants Gibilisco, Larsen, and Rowe violated plaintiff's rights
4 under the First, Fifth, and Fourteenth Amendments to the United States Constitution. ECF No. 16
5 at 3-6. Specifically, plaintiff alleges that on June 27, 2024, Larsen failed to protect plaintiff from
6 another inmate who Larsen knew was trying to attack plaintiff. Id. at 3. When the other inmate
7 started to attack plaintiff, Larsen laughed and said, "that's what you get for telling everything."
8 Id. at 3, 4. Plaintiff claims that Larsen was referring to the several grievances and lawsuits
9 plaintiff had filed against several deputies for improper behavior. Id. at 4.

10 Plaintiff also alleges that Gibilisco told plaintiff and the other inmate to stop fighting. Id.
11 at 5. Plaintiff tried to explain that he was the one being attacked. Gibilisco did not listen and
12 instead tased plaintiff. Id. After plaintiff was down on the ground, Gibilisco continued to tase
13 plaintiff, said "I'll fry your ass," called him a rat for filing grievances and lawsuits against
14 deputies at the jail, and told him "now go tell them that." Id. at 5, 6. Larsen eventually stopped
15 Gibilisco, but Larsen and Rowe agreed that plaintiff was a rat. Id. at 5.

16 Plaintiff further alleges that as a result of Larsen's and Gibilisco's actions he urinated and
17 defecated on himself and suffered a swollen eye, bruises, depression, and emotional distress. Id.
18 at 3-6.

19 C. Claims for Which a Response Will Be Required

20 After conducting the screening required by 28 U.S.C. § 1915A(a), the court finds that
21 plaintiff has adequately stated valid claims for relief against defendant Larsen for retaliation and
22 failure to protect, and against Gibilisco for retaliation and excessive force.³

23 ³ Plaintiff does not specify whether he was a pretrial detainee in custody for violation of
24 probation, parole, or supervised release at the time of the alleged constitutional violations. And
25 no precedential Ninth Circuit case has addressed whether a convicted felon already serving a
26 sentence should be treated as a pretrial detainee on a new probation or parole charge or as a
27 convicted felon. The court does not need to resolve this issue for screening purposes because
28 plaintiff has alleged sufficient facts to state cognizable claims for excessive force against
Gibilisco and failure to protect against Larsen under either the Eighth or Fourteenth Amendments.
See Attachment A. However, if plaintiff chooses to amend the complaint, he should be sure to
(continued...)

1 D. Failure to State a Claim

2 The allegations in the complaint are not sufficient to state any claim for relief against
3 defendant Rowe. There are *no facts* demonstrating that Rowe used unreasonable or excessive
4 force towards plaintiff, that Rowe failed to protect plaintiff from another inmate or the other
5 deputies, or that Rowe acted in a retaliatory manner in response to plaintiff's participation in a
6 protected activity. See Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) ("A person 'subjects'
7 another to the deprivation of a constitutional right, within the meaning of section 1983, if he does
8 an affirmative act, participates in another's affirmative acts, or omits to perform an act which he
9 is legally required to do that causes the deprivation of which complaint is made.") (citation
10 omitted).

11 It appears to the court that plaintiff may be able to allege facts to fix these problems.
12 Therefore, plaintiff has the option of filing an amended complaint.

13 E. Options from Which Plaintiff Must Choose

14 Based on the court's screening, plaintiff has a choice to make. After selecting an option
15 from the two options listed below, plaintiff must return the attached Notice of Election form to
16 the court within 21 days from the date of this order.

17 **The first option available to plaintiff is to proceed immediately against defendant
18 Larsen on the retaliation and failure to protect claims, and against Gibilisco on the
19 retaliation and excessive force claim. By choosing this option, plaintiff will be agreeing to
20 voluntarily dismiss defendant Rowe. The court will proceed to immediately serve the
21 complaint and order a response from defendants Larsen and Gibilisco.**

22 **The second option available to plaintiff is to file an amended complaint to fix the
23 problems described in Section I.D. against defendant Rowe. If plaintiff chooses this option,
24 the court will set a deadline in a subsequent order to give plaintiff time to file an amended
25 complaint.**

26 ////

27

28 include information regarding his custody status at the time of the use of force and failure to
protect.

1 II. Motion for Preliminary Injunction

2 On September 13, 2024, plaintiff filed a “Complaint for Preliminary and Permanent
 3 Injunction and Damages,” seeking injunctive relief and to recover damages against defendants for
 4 excessive force and failure to protect. ECF No. 7 at 1. This filing describes how defendants
 5 Larsen and Gibilisco violated plaintiff’s rights on June 27, 2024, and alleges that “[a]s a result of
 6 defendants actions, plaintiff has suffered and will continue to suffer extreme hardship and actual
 7 and impending irreparable injury, loss, and damage.” Id. at 3-5. The undersigned construes this
 8 filing as a motion for preliminary injunction and recommends it be denied.

9 A. Legal Standard Governing Preliminary Injunctive Relief

10 “A preliminary injunction . . . is not a preliminary adjudication on the merits but rather a
 11 device for preserving the status quo and preventing the irreparable loss of rights before
 12 judgment.” Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984).
 13 A preliminary injunction represents the exercise of “a very far reaching power never to be
 14 indulged in except in a case clearly warranting it.” Dymo Indus., Inc. v. Tapeprinter, Inc., 326
 15 F.2d 141, 143 (9th Cir. 1964). It is an “extraordinary and drastic remedy”; it is never awarded as
 16 of right.” Munaf v. Geren, 553 U.S. 674, 689-90 (2008) (citation omitted).

17 “The proper legal standard for preliminary injunctive relief requires a party to demonstrate
 18 ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
 19 absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction
 20 is in the public interest.’” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir.
 21 2009) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)) (internal quotations
 22 omitted). “Those seeking injunctive relief must proffer evidence sufficient to establish a
 23 likelihood of irreparable harm.” Herb Reed Enterprises, LLC v. Fla. Ent. Mgmt., Inc., 736 F.3d
 24 1239, 1251 (9th Cir. 2013).

25 The Ninth Circuit’s sliding-scale test for a preliminary injunction has been incorporated
 26 into the Supreme Court’s four-part Winter standard. Alliance for the Wild Rockies v. Cottrell,
 27 632 F.3d 1127, 1131 (9th Cir. 2011) (explaining that the sliding scale approach allowed a
 28 stronger showing of one element to offset a weaker showing of another element). “In other

1 words, ‘serious questions going to the merits’ and a hardship balance that tips sharply toward the
2 plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test
3 are also met.” Alliance for the Wild Rockies, 632 F.3d at 1131-32. Additionally, in cases
4 brought by prisoners involving conditions of confinement, any preliminary injunction “must be
5 narrowly drawn, extend no further than necessary to correct the harm the court finds requires
6 preliminary relief, and be the least intrusive means necessary to correct that harm.” 18 U.S.C.
7 § 3626(a)(2).

8 B. Analysis

9 Plaintiff fails to meet the requirements for a preliminary injunction because he has not
10 established he will suffer irreparable harm absent preliminary relief in this case. As an initial
11 matter, plaintiff does not describe what conduct he wants the court to enjoin. To the extent
12 plaintiff seeks to enjoin defendants from engaging in further acts of retaliation, excessive force, or
13 failure to protect, he makes only unsupported, conclusory assertions that he will suffer
14 “impending irreparable injury, loss, and damage,” which is not sufficient to merit relief.
15 See Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (“Speculative
16 injury does not constitute irreparable injury sufficient to warrant granting a preliminary
17 injunction.” (citing Goldie’s Bookstore, Inc. v. Superior Ct., 739 F.2d 466, 472 (9th Cir. 1984))).
18 Moreover, plaintiff has failed to put forth *evidence* to substantiate any allegations of irreparable
19 harm. See Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., 736 F.3d 1239, 1251 (9th Cir. 2013)
20 (“Those seeking injunctive relief must proffer evidence sufficient to establish a likelihood of
21 irreparable harm.”); see also Fidelity Nat. Title Ins. Co. v. Castle, No. C-11-00896-SI, 2011 WL
22 5882878, *3, 2011 U.S. Dist. LEXIS 135316, *9 (N.D. Cal. Nov. 23, 2011) (“A motion for
23 preliminary injunction must be supported by ‘[e]vidence that goes beyond the unverified
24 allegations of the pleadings.’”) (citation omitted). Accordingly, plaintiff’s motion for preliminary
25 injunction should be denied.

26 III. Motions to Appoint Counsel

27 Plaintiff’s motions to appoint counsel and plaintiff’s TAC argue that the court should
28 appoint counsel because plaintiff cannot afford a lawyer, plaintiff has been granted leave to

1 proceed in forma pauperis in this case,⁴ plaintiff's incarceration will limit his ability to litigate the
2 case, the case presents complex issues that will likely require substantial investigation and
3 discovery, he does not have the training and education of a lawyer to present his case, and all of
4 his efforts to obtain a lawyer have been unsuccessful. See ECF Nos. 6, 13; see also ECF No. 16
5 at 7-8 (TAC includes a motion for appointment of counsel).

6 A. Legal Standard

7 The United States Supreme Court has ruled that district courts lack authority to require
8 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490
9 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the
10 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d
11 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

12 When determining whether "exceptional circumstances" exist, the court must consider
13 plaintiff's likelihood of success on the merits as well as the ability of the plaintiff to articulate his
14 claims pro se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d
15 965, 970 (9th Cir. 2009) (district court did not abuse discretion in declining to appoint counsel).
16 The burden of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances
17 common to most prisoners do not establish exceptional circumstances that warrant a request for
18 voluntary assistance of counsel.

19 B. Analysis

20 Having considered the factors under Palmer, the court finds that plaintiff has failed to
21 meet his burden of demonstrating exceptional circumstances warranting the appointment of
22 counsel at this time. Plaintiff has been able to articulate cognizable retaliation, excessive force,
23 and failure to protect claims, which are not complex. Additionally, indigency, inability to retain
24 counsel, lack of legal education, and incarceration, are all circumstances common to most
25 prisoners. Accordingly, plaintiff's motions for appointment of counsel are denied.

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⁴ The court notes that until today, the court had not yet ruled on the motion to proceed in forma
28 pauperis in this case.

IV. Motions for Discovery

2 Plaintiff has filed three motions seeking to commence discovery in this case, ECF Nos. 9,
3 10, 12, one of which includes a request for production, ECF No. 10 at 5-12. Accordingly, the
4 court construes these motions as motions for discovery. Because this case is still at the screening
5 stage and no defendant has been served, plaintiff's motions for discovery are denied as premature.
6 In the event any defendant is served and files an answer, a schedule will be set for discovery at
7 that time.⁵

V. Plain Language Summary of this Order for Party Proceeding Without a Lawyer

9 Some of the allegations in the complaint state claims against the defendants and some do
10 not. You have stated claims against Larsen for retaliation and failure to protect and claims
11 against Gibilisco for retaliation and excessive force. You have not stated any other claims against
12 them or any other defendants.

13 You have a choice to make. You may either (1) proceed immediately on your retaliation
14 and failure to protect claims against Larsen, and retaliation and excessive force claims against
15 Gibilisco and voluntarily dismiss the other claims; or, (2) try to amend the complaint. To decide
16 whether to amend your complaint, the court has attached the relevant legal standards that may
17 govern your claims for relief. See Attachment A. Pay particular attention to these standards if
18 you choose to file an amended complaint.

CONCLUSION

20 In accordance with the above, IT IS HEREBY ORDERED that:

21 1. The Clerk of the Court shall randomly assign a United States District Judge to this
22 action.

23 2. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) is GRANTED.

24 3. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
25 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.

⁵ Plaintiff is advised that if the case proceeds to discovery, he should not file his requests for production with the court and should direct them to defense counsel. See Fed. R. Civ. P. 5(b); E.D. Cal. L.R. 250.1, 250.2, 250.3, and 250.4.

1 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
2 appropriate agency filed concurrently herewith.

3 4. Plaintiff's motions to appoint counsel (ECF Nos. 6, 13) are DENIED.
4 5. Plaintiff's motion for discovery (ECF No. 9, 10, 12) are DENIED as premature.
5 6. Plaintiff's claims against defendant Rowe in the TAC (ECF No. 16) do not state
6 claims for which relief can be granted.
7 7. Plaintiff has the option to proceed immediately on his retaliation and failure to protect
8 claims against Larsen and retaliation and excessive force claims against Gibilisco as set forth in
9 Section I.C. above, or to file an amended complaint.

10 8. **Within 21 days** from the date of this order, plaintiff shall complete and return the
11 attached Notice of Election form notifying the court whether he wants to proceed on the screened
12 complaint or whether he wants to file an amended complaint.

13 9. **If plaintiff does not return the form, the court will assume that he is choosing to
14 proceed on the complaint as screened and will recommend dismissal without prejudice of
15 plaintiff's claims against defendant Rowe.**

16 IT IS HEREBY RECOMMENDED that plaintiff's motion for preliminary injunction
17 (ECF No. 7) be DENIED.

18 These findings and recommendations are submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
20 after being served with these findings and recommendations, plaintiff may file written objections
21 with the court and serve a copy on all parties. Such a document should be captioned
22 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
23 objections shall be served and filed within fourteen days after service of the objections. Plaintiff
24 is advised that failure to file objections within the specified time may waive the right to appeal the
25 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 DATED: February 13, 2025

27 
28 ALLISON CLAIRE
 UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILSON LEBRANDON WHITE,

No. No. 2:24-cv-2273 AC P

Plaintiff,

V.

MIKE GIBILISCO, et al.,

NOTICE OF ELECTION

Defendants.

Check one:

17 Plaintiff wants to proceed immediately on his retaliation and failure to protect claims
18 against Larsen and retaliation and excessive force claims against Gibilisco without
19 amending the complaint. Plaintiff understands that by choosing this option, defendant
20 Rowe will be voluntarily dismissed without prejudice pursuant to Federal Rule of Civil
21 Procedure 41(a).

23 Plaintiff wants time to file an amended complaint.

25 || DATED:

Wilson LeBrandon White
Plaintiff pro se

Attachment A

This Attachment provides, for informational purposes only, the legal standards that may apply to your claims for relief. Pay particular attention to these standards if you choose to file an amended complaint.

I. Legal Standards Governing Amended Complaints

If plaintiff chooses to file an amended complaint, he must demonstrate how the conditions about which he complains resulted in a deprivation of his constitutional rights. Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint must specifically identify how each named defendant is involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's actions and the claimed deprivation. Id.; Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, “[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient.” Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

Plaintiff is also informed that the court cannot refer to a prior pleading in order to make his amended complaint complete. See Local Rule 220. This is because, as a general rule, an amended complaint replaces the prior complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012). Therefore, in an amended complaint, every claim and every defendant must be included.

II. Legal Standards Governing Substantive Claims for Relief

A. Fourteenth Amendment

i. Excessive Force

Under the Fourteenth Amendment, “a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.” Kingsley v. Hendrickson, 576 U.S. 389, 396-97 (2015). “[O]bjective reasonableness turns on the ‘facts and circumstances of each particular case’” and must be determined “from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.” Id. at 397 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

1 Considerations such as the following may bear on the reasonableness or unreasonableness of the
 2 force used: the relationship between the need for the use of force and the amount of force used;
 3 the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount
 4 of force; the severity of the security problem at issue; the threat reasonably perceived by the
 5 officer; and whether the plaintiff was actively resisting. Id. at 397.

6 ii. Failure to Protect

7 Pretrial detainees also have a due process right to be free from violence from other
 8 inmates. Castro v. County of Los Angeles, 833 F.3d 1060, 1067 (9th Cir. 2016). To state a claim
 9 for failure to protect under the Fourteenth Amendment, plaintiff must allege facts showing

10 (1) The defendant made an intentional decision with respect to the
 11 conditions under which the plaintiff was confined;
 12 (2) Those conditions put the plaintiff at substantial risk of suffering
 13 serious harm;
 14 (3) The defendant did not take reasonable available measures to abate
 15 that risk, even though a reasonable officer in the circumstances
 would have appreciated the high degree of risk involved—making
 the consequences of the defendant's conduct obvious; and
 (4) By not taking such measures, the defendant caused the plaintiff's
 injuries.

16 Id. at 1071.

17 B. Eighth Amendment

18 i. Excessive Force

19 The Eighth Amendment prohibits prison officials from inflicting cruel and unusual
 20 punishment on inmates which has been defined as “the unnecessary and wanton infliction of
 21 pain.” Whitley v. Albers, 475 U.S. 312, 319 (1986). “[W]henever prison officials stand accused
 22 of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the
 23 core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore
 24 discipline, or maliciously and sadistically to cause harm.” Hudson v. McMillan, 503 U.S. 1, 7
 25 (1992). The court’s inquiry into an excessive force claim focuses on the extent of the prisoner’s
 26 injury, the need for application of force, the relationship between that need and the amount of
 27 force used, the threat reasonably perceived by the responsible officials, and any efforts made to
 28 temper the severity of a forceful response. Hudson, 503 U.S. at 7 (1992) (quotation marks and

1 citations omitted). While the absence of a serious injury is relevant to the Eighth Amendment
 2 inquiry, it does not end it. Hudson, 503 U.S. at 7. The malicious and sadistic use of force to
 3 cause harm always violates contemporary standards of decency in violation of the Eighth
 4 Amendment. Whitley, 475 U.S. at 327.

5 ii. Failure to Protect

6 “Prison officials have a duty to take reasonable steps to protect inmates from physical
 7 abuse.” Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982), abrogated on other grounds by
 8 Sandin v. Conner, 515 U.S. 472 (1995). To be liable under the Eighth Amendment for failure to
 9 protect, a prison officials “knows of and disregards an excessive risk to inmate health or safety.”
 10 Farmer v. Brennan, 511 U.S. 825, 837 (1994). He must then fail to take reasonable measures to
 11 lessen the substantial risk of serious harm. Id. at 847. Negligent failure to protect an inmate from
 12 harm is not actionable under § 1983. Id. at 835.

13 C. First Amendment Retaliation

14 “Prisoners have a First Amendment right to file grievances against prison officials and to
 15 be free from retaliation for doing so.” Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir.
 16 2012) (citing Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). “Within the prison context,
 17 a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a
 18 state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected
 19 conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and
 20 (5) the action did not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson,
 21 408 F.3d 559, 567-68 (9th Cir. 2005).

22 D. Personal Involvement

23 The civil rights statute requires that there be an actual connection or link between the
 24 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
 25 Monell v. Dep’t of Soc. Servs. of City of New York, 436 U.S. 658 (1978); Rizzo v. Goode, 423
 26 U.S. 362 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation
 27 of a constitutional right, within the meaning of section 1983, if he does an affirmative act,
 28 participates in another’s affirmative acts, or omits to perform an act which he is legally required

1 to do that causes the deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740,
2 743 (9th Cir. 1978) (citation omitted). In order to state a claim for relief under section 1983,
3 plaintiff must link each named defendant with some affirmative act or omission that demonstrates
4 a violation of plaintiff’s federal rights.

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